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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 291

UNION BROKERAGE COMPANY, A CORPORATION,
Petitioner,

vs.

NORMAN G. JENSEN AND CURTIS M. RIME.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I.

Respondent questions the seven points raised by Petitioner.

While it is true that the fundamental question in this case is: "Was, and is, the petitioner, a North Dakota Corporation, whose business is that of a duly licensed custom-house broker for U. S. Customs Collection District 34, aiding and facilitating the free flow of commerce, and therefore engaged in 'commerce', within the purview of cl. 3, Sec. 6, Art. I of the Constitution of the United States" yet, that question presents and involves at least each of the seven phases raised by Petitioner.

Here we have a North Dakota corporation, Federally licensed by authority of the Congress, exercising the privi-

lege of carrying on as its business the clearing of shipments of goods moving in foreign commerce between the Dominion of Canada and the United States. That privilege and business is carried on in a district, which includes within its boundaries, one of the counties of the State of Minnesota.

Petitioner in doing its required business under its license as customhouse broker, at the port of entry, gets, from the incoming carrier, the bills of lading which are its title papers to the goods in transit on board the incoming train, authorizing it to "clear" those goods. When invested with the title to the goods on board the train at the Port of Entry, and in the custody of the Collector of Customs, it presents a copy of the invoice to "Customs." Then an inspector is sent to make the inspection of the goods on board the train and shown on the invoice. When the "inspection" has been made by the Government's inspector, the shipment is released from the Collector's custody, and goes forward through the Port of Entry to the ultimate consignee.

The broker, if he have an immediate delivery bond has 48 hours in which to complete the "entry" for the records of the Collector of Customs. An "entry" must be made, by the broker.

The stopping of the imported goods is thus temporary and the broker's service and work on the shipment is done and completed before the goods become commingled with the property of the State. All of these its activities are prescribed by the Tariff Act as amended and by the Regulations made pursuant thereto (Exh. "DDD"; Ff. 1 and 2 and first 4 lines of f. 3, p. 170; f. 1, p. 258; f. 3, p. 272; f. 1, p. 273; f. 1, p. 278; last 2 lines p. 278, and first 2 lines on p. 279; beginning with "Q" at top, the balance of p. 281, p. 282; ff. 1 and 2, of p. 283; pp. 383, 384 and ff. 1 and 2, p. 284; last 2 lines of f. 1, f. 2 and 1st four lines of f. 3, p. 575, Record).

This stop, required by law, to permit this necessary service for the Government, for the shipper and for the importer or ultimate consignee, does not interrupt or end the journey of the goods in foreign commerce. The forward movement of the goods cleared from the "Port" remain foreign commerce until the goods become commingled with the property of the State after they have reached the ultimate consignee (*U. S.* v. *Sheffield Farms Co.*, 43 Fed. Supp. 1, 5).

The District Court held that the Petitioner was rightfully in court and ruled that the business was interstate commerce.

The Honorable Supreme Court of Minnesota reversed this ruling of the lower court by saying:

> "We fail to see how such broker is an instrumentality of the commerce. Therefore, it seems to us that the statutory requirement is not an obstruction or interference with interstate commerce."

It seems to us that this ruling of the Supreme Court of Minnesota invalidated the force, effect and scope of Petitioner's license as customhouse broker for that part of the district which lies within the boundaries of the State of Minnesota.

Such an effect, arising from the judicial application of the Minnesota Foreign Corporation Act clearly raises, as phases of the basic problem of this case, the first, third and fifth "questions presented." That is, which is the paramount authority—the authority of the Federal Government or the prohibition of the Minnesota Foreign Corporation Act?

The result of the Minnesota decision seems to invalidate the authority of Congress.

Question 2 is another phase of the basic or "ultimate" question in this case.

So are questions 4, 6 and 7.

II.

Respondent's "Additions and Corrections" Considered.

(a) Several of those pointed out by Respondent are, probably, of little consequence here. In any event we do not believe that many of them go to the heart of the issue. Some of the "additions and corrections" go beyond the Record, as will be presently pointed out.

It seems to us that it is immaterial that the Court found that Jensen kept for himself the customhouse brokerage business at Northgate, North Dakota. As Petitioner's president and manager his possession and control of Petitioner's business was fiduciary in character whether he kept or did not keep the Northgate business.

Backus v. *Finkelstein*, 23 F. (2d) 357, 364;
Guth v. *Loft, Inc.*, 5 Atl. (2d) 503 (Del.).

The Northgate business, if there was any, did not give him a license to betray his principal. While he was paid and accepted compensation for serving Petitioner as manager he followed, and took, at Noyes, Minnesota, the Petitioner's business for his own profit in defiance of the duties which his fiduciary relations imposed on him. His duty required him to conserve and develop—not to destroy—the business of the Petitioner.

(b) Next, Counsel impliedly criticizes the use of the phrase "95 per cent, or more of its freight shipments." The finding of the District Court is couched in conservative language. In the course of Respondent's testimony on this subject the Record shows the following:

> "Q. Now, Mr. Jensen, when this change occurred in routing of shipments of merchandise, the good will of the corporation customhouse broker became completely wiped out unless the corporation was able to follow the changed flow of commerce, isn't that right?"

"A. I presume you can put it that way." (Lines 13 to 19, F. 2, P. 150, R.)

And at lines 7 and 8, F. 1, p. 151, R., he testified the change "affected a large percentage—maybe 90 or 95 percent." He would not exaggerate. His testimony represents the minimum effect of the change.

At p. 153, ff. 2 and 3, this testimony is found:

"Q. We'll make it specific—*the 95 percent or more* (Italics supplied) of shipments that used to go through Portal, whether shipped by these people or other people, became, by reason of this change in routing, shipped into the United States through Noyes, isn't that right?"

"A. The great majority of them came through Noyes."

"Q. And so you agree that when this rerouting of shipments of merchandise or routing of shipments virtually ceased at Portal and was transferred to Noyes, Minnesota, that the corporation license permitted it to do business at Noyes or serve its clients there at Noyes the same as it had or could have been done at Portal, isn't that right?"

"A. The corporation license was valid in Noyes."

"Q. Then please answer my question?"

(Question, lines 5 to 10 above, read to witness.)

"A. That's right."

(c) Respondent's counsel has committed the unfortunate error of going beyond the record. His assertions beginning with the period "pursuant" at the end of the first line on page 4, to the end of the paragraph are not in the record agreed upon. (See paragraphs (b) and (c) of the stipulation of the parties, dated July 8, 1943.)

Similarly the two first paragraphs of p. 5 of Respondent's brief are not in the record. These are therefore unauthorized "additions", and Petitioner respectfully asks the Court to ignore them.

(d) Counsel for Respondent emphasizes Article 1410, Customs Regulations of 1937. For the moment we think it is enough to say that this regulation manifestly falls short of authorizing either a faithless agent to defraud his principal or of authorizing the imposition of regulations and restrictions which are a burden on, and an obstruction to, "commerce".

(e) Of course "Jensen did not issue any carrier's certificates." He procured their issuance to replace the bills of lading, detached from the waybills when they reached either the Port of Entry or the Port of Exit. Those detached bills of lading consigned the shipments of merchandise to Petitioner for "clearance." The following are pertinent excerpts of the testimony of Mr. Rime, who was Jensen's attorney in fact, showing what was done:

> "Q. And those shipments or the evidences of such brokers consignments were taken over to the C. P. R. by you or by Mr. Jensen isn't that right, through (to) the Canadian side?"
>
> "A. That's right."
>
> "Q. And there you prevailed or secured the—prevailed upon the officials of the C. P. R. or secured their consent to have the certificates changed on those Bills of Lading so that you could make entry?"
>
> "A. Not necessarily."
>
> "Q. What do you mean by 'not necessarily'; I would like to have positive answers; you did, didn't you?"
>
> "A. Oh yes, I did."
>
> "Q. Yes—and you understood all the time that without such change you couldn't under your power of attorney or Mr. Jensen couldn't use—couldn't under his license broker those shipments?"
>
> "A. That's right."
>
> (Fol. 3, p. 444 and Fol. 1, p. 445, R.)

He further testified:

"Q. Why did you resort to that practice?"

"A. Because they refused to allow me to make entry at the customhouse."

"Q. That is, the custom officials refused to let you act as broker on the shipments consigned to the Union Brokerage Company?"

"A. Yes."

"Q. And so, to avoid that regulation, you did, and Mr. Jensen did what you have just described?"

"A. Yes."

"Q. And the thing you did consisted of what we have talked about this afternoon, namely, that the stamp was left with the man in Emerson, isn't that right?"

"A. It was."

* * * * * * *

"Q. And who provided it (the stamp) for the office?"

"A. Jensen."

(Last 6 lines, p. 445, F. 1, p. 446, F. 2, p. 446, R.)

He further testified:

"Q. * * * is it not true that when shipments came consigned to the Union Brokerage Company, for example, or some other agent or some other broker whose business you or Jensen claimed, that in such cases these bills of lading were taken over and the stamp used to get the proper carrier's certificate so that clearances could be made?"

"A. That's true."

(Fol. 2, p. 449, R.)

And he also testified:

"Q. You never wired in a case of that kind the shipper named in such a bill of lading for authority to make the change, did you?"

"A. I never wired, no" (Last 4 lines, p. 466, R.).

"Q. Well then, I want to have you understand that my original question on that subject related to cases where you had brought the papers to Spear over at Emerson for changes—did you ever see anybody wire for instructions in regard to changes that you desired?"

"A. I never watch them do those things."

"Q. Well, did you see any?"

"A. No" (First 9 lines, p. 468, R.).

(f) We think, and respectfully submit, that the definition by the Minnesota Supreme Court of the duties of customhouse brokers is neither controlling nor important because its "definition" cannot change or modify, either the testimony in the case, or the express language of the Act of Congress or the Rules and Regulations adopted by the Treasury Department pursuant to the Act of Congress. These alone authoritatively define "the duties of customhouse brokers". The Courts interpret the effect of those statutes and regulations when they come in contact with concrete cases. Any other theory presupposes the existence of both the power and the inclination of the courts to legislate, and to thus usurp the powers and functions of the Congress, and the Agency designated by Congress, to administer the general revenue and Tariff systems of our country.

Therefore our duty to our client compels us to respectfully disagree with counsel for the Respondent as to what are duties of customhouse brokers. (See, sub-div. (d), Sec. 1; sub-div. (6), Sec. 8; Sec. 9, especially sub-divisions (i), (m), (g), (t), Exh. "A"; sub-div. (b), Sec 11, Exh. "A".)

(g) It is true that "an importer" may clear his own imports. But, to "protect the revenue of the United States" he must, like the broker, furnish a bond to insure

the payment of any additional duties which might thereafter be assessed against his importation.

It is also true, that the Government may retain possession of the imported merchandise until the duty thereon is paid.

No argument is required, we think, to demonstrate that such procedure, if practiced, hinders or impedes the free flow of foreign commerce, and leaves the revenue of the United States at least in a precarious condition.

Likewise no argument seems necessary to justify the conclusion that the licensed customhouse broker, who furnishes a bond, good for all his client importers, and who supplants uncertainty with certainty as to revenues, and who expedites the flow of foreign commerce, directly aids those engaged in the nation's foreign commerce by providing the means by which the United States is able to more expeditiously and economically secure the collection of its necessary revenues.

Performing that function and service the broker becomes an integral part of our foreign commerce, and an "instrumentality employed by the United States" to achieve that end or effect. He is at least employed by or serving those who actually engaged in foreign commerce, and his functions, business and duties are inseparably involved in the movement of goods, not before and not after, but while enroute in the movement in foreign commerce. Without the actual movement of goods in foreign commerce,—in foreign commerce enroute he has no purpose or function.

Mr. Phillips' Testimony.

(h) At p. 6 of Respondent's brief his counsel quotes a small part of Mr. Phillips' testimony and calls it his "pertinent testimony". That characterization is accurate only if considered in relation to other testimony on the subject. The pertinency appears when considered in connec-

tion with the admissions of Mr. Rime, reviewed under "e" of "Respondent's 'Additions and Corrections' Considered" of this reply brief, to Exhibits DDD and Q, and to Mr. Mackay's testimony. We refer to ff 2 and 3 except the last question, p. 390, f. 1, and 1st sentence of f. 2, p. 391, p. 393 ff 1 and 2, p. 394, last 3 lines of p. 395, p. 396, p. 404, ff 2 and 3, p. 408 and first line, p. 439; f. 2, p. 415, ff 2 and 3, p. 417, f. 1, p. 418, last two lines of f. 2 and f. 3, p. 570, f. 3, p. 571, ff 1 and 2, p. 572, ff 1 and 2, p. 574, ff 2 and 3, p. 575, ff 1 and 2, p. 580; f. 1 except first two lines and last 5 lines of f. 2, ff 1-3, except first 2 lines, p. 582, ff 1 and 2, p. 583, first par. of p. 584 (R. —). The bill of lading vests at least a qualified title in the broker. A stranger to that title cannot take it away.

Mr. Rime, as has been shown, admitted that he did not see anyone wiring to shippers for authority to change the designation of the consignee on the bills of lading. Without a change in the name of the consignee the shipments could not be cleared by him or Jensen through customs. Evidently to evade this rule, and to avoid detection in Noyes, the change was made in Emerson by detaching the Bills of lading and substituting carrier's certificates in their place and by stamping Jensen's name in place of that of the petitioner's. This done they were taken back to Noyes where these carrier's certificates were then used as credentials for clearing the shipments.

The quoted testimony of Mr. Phillips does not change these facts.

III.

Jurisdictional Statement Supplemented—Considered.

The additions to Petitioner's Jurisdictional Statement are harmless because they are immaterial to the issue presented by this petition for the writ of certiorari.

IV.

Reasons Assigned for Denial of Writ Considered.

(a) It is true that the loss suffered by Petitioner from the reversal of the lower court's decision is not in and of itself sufficient to warrant the granting of this petition. But we understand it is the rule that a Petitioner for "writ of certiorari" must show himself injured by the decision complained of. One who has suffered no damage from a decision deemed objectionable cannot be heard to complain.

Vollier v. *Neilston Warehouse Co.*, 311 U. S. 624, 85 L. Ed. 314.

That the Petitioner has sustained damage because of the decision of the Minnesota Court cannot well be disputed. The Respondent, while pretending to be faithfully and efficiently managing Petitioner's business for a paid salary of $250.00 a month, plus his expenses, deliberately violated the confidence reposed in him by his two widowed associate directors, deceived the Petitioner and transformed this prosperous corporate customhouse brokerage business into one conducted by him for his own use and profit, and then called it his own business. In executing this enterprise he used up all funds of his principal.

The District Court found him guilty of this deceit, and adjudged him, as constructive trustee, to pay over to Petitioner the net profits of 17 months of business, taken in and appropriated by him, in executing that deception. The Supreme Court of Minnesota annulled that judgment. That decision of the Supreme Court left the Petitioner empty-handed, and, on the other hand, left the Respondent in possession of the fruits of his faithless conduct.

This, we maintain, demonstrates that the Petitioner has suffered injury from the decision, which involves constitutional rights.

(b) Respondent repeatedly refers to Art. 1410, Customs Regulations of 1937, Sec. 6 of Exh. "A", as a sanctuary for avoiding the consequences of his conduct. We think this effort is vain, for here the issue concerns "commerce." The Minnesota Foreign Corporation Act, if it burdens or obstructs "commerce", is not any the less a burden because of that indefinite statement. Before the authority of Congress over "foreign commerce" may be impeached or challenged an "assent" to such state action must be expressly given by Congress.

Webber v. *State of Virginia*, 103 U. S. 344, 26 L. Ed. 565;
Brennan v. *City of Titusville*, 153 U. S. 289, 38 L. Ed. 719;
Welton v. *Missouri*, 91 U. S. 275, 23 L. Ed. 347.

Syllabus 4 of this last case reads:

> "The inaction of Congress in prescribing rules to govern interstate commerce, is equivalent to its declaration that such commerce shall be free from any such restrictions" (p. 348).

Sec. 6 of Exh. "A" is no "assent" of Congress.

(c) Respondent seems to argue that under the Minnesota Foreign Corporation Act domestic and foreign corporations occupy positions of parity. Counsel says, p. 13:

> "* * * and, if so, if it is 'interfered with' or 'burdened' by such restrictive requirements as those imposed by the Minnesota Foreign Corporation Act, *requiring the petitioner, before it can have access to the courts of Minnesota, and before it can do business in the State of Minnesota, to qualify, pay the same franchise tax as a domestic corporation, and to appoint an agent upon whom service of process can be made.*" (Italics supplied.)

If counsel intended by this language to present such a claim he is grossly in error. There is a vast difference be-

tween the requirements on a domestic corporation and those on a foreign corporation. Under the Minnesota law the Petitioner is subjected to accumulating penalties, now aggregating, if computed, to at least $4000.00, just for failing to get a certificate of authority. (See 303.10, p. 15; 303.20, pp. 16, 17; 303.21, pp. 17, 18, Petition for Writ of Certiorari.)

(d) Respondent has challenged the fourth reason assigned by Petitioner for the granting of this petition and says:

> "This very question * * * has been decided by the Louisiana Supreme Court in the case of State vs. Oberle, Inc., 183 So. 347, supra."

This is, of course, a mistake.

A finding that a corporation is liable to the payment of taxes in a given state is not a finding that it is engaged in intrastate business. A corporation engaged in interstate or foreign commerce is not, by force of that fact, immune from local or state taxation. In this action the petitioner is not seeking immunity from the payment of proper taxes. Its claim here is that its activities and business affect, and are so much a part of, interstate (and foreign) commerce that the provisions of the Minnesota Foreign Corporation Act, when used to deny it access to the courts of Minnesota, "interefere with" and are a "burden" on "commerce."

The case of *State* v. *Oberle, Inc., supra*, does not decide "this very question". It concerns itself exclusively with the liability of Oberle, Inc., to pay the tax levied against it under the laws of Louisiana.

The case of *Duluth, S. S. & A. R. Co.* v. *Wilson*, 167 N. W. 55, is also not in point. The issue involved in the *Wilson* case is stated thus by that Court:

> "Action to recover the amount which defendant has retained of fees as customs broker while in plaintiff's

employment as chief clerk at Sault St. Marie." * * * (p. 53).

"It is the claim of the plaintiff that by reason of this arrangement it was entitled to retain and have the fees earned by the defendant. On the other hand, it is the claim of the defendant that, as he was the customs broker, he was entitled to the fees which he had earned * * *" (p. 56).

"It is manifest," the Court continued, "That the contract in question contained no engagement on the part of the plaintiff to do anything for which a license was required. * * * The contract was between the plaintiff and the defendant with reference to the disposition of the fees arising from such employment * * *."

The Court's discussion of the functions and duties of a customhouse broker is obiter.

The case of *Hopkins* v. *United States*, 171 U. S. 578, 43 L. Ed. 290, is also barren of any ruling which can be twisted into a decision of "this very question." The fact statement made by Justice Peckham takes that case out of the realm of the present controversy; and the Court, speaking through Justice Peckham, in deciding that case, only adds force to that claim. The Court, defining the issue of that case, said, p. 294, L. Ed.:

"The relief sought in this case is based exclusively on the act of Congress approved July 2, 1890, Chap. 647, entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies', commonly spoken of as the anti-trust act."

Stray and detached phrases from that, or any other, decision, whether used to state or to reach it, cannot be used to state a rule of law, controlling the issue raised here.

But, above and beyond these considerations, this case of *Hopkins* v. *United States, supra*, is one of those cases in which the Commerce Clause was given a restricted inter-

pretation and which "allowed but little scope to the power of Congress." *Wickard* v. *Filburn*, 87 L. Ed. 57, 63. It was rendered at the beginning of the period which "ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder."

Wickard v. *Filburn, supra.*

The interpretation of the Commerce Clause made in the *Hopkins* case has been superseded by later decisions, so that it no longer represents the interpretation of the Commerce Clause.

This Court has returned "to the principles first enunciated by Chief Justice Marshall in Gibbons *vs.* Ogden, supra."

Wickard v. *Filburn*, 87 L. Ed. 57, 63.

Hence the decision in *Hopkins* v. *United States, supra*, is no authority here.

We believe that as used under authority of Congress, customhouse brokers are adjuncts of our foreign commerce, and as such "the means" necessarily employed therein. As such they are engaged in foreign commerce.

Chicago and NW Ry. Co. v. *Fuller*, 84 U. S. 560, 21 L. Ed. 710, 714, citing 2 Story, Const. paragraphs 1061, 1062.

(e) Respondent criticises the eighth reason urged by Petitioner for granting its petition, and in doing so he quotes a small part from p. 734, R.

But following that quoted language the Minnesota Court says:

> "*There has not always been uniformity in the federal decisions even with respect to the general principles to be followed.*" P. 734 R. (Italics Supplied.)

And at p. 735, R. the Minnesota Court says;

> "* * * Thus we observe the confusion that has resulted in an attempt to definte interstate commerce, but the greater difficulty has arisen in attempting to apply the general principles to the factual situation in each case."

If Congress has been silent in this exclusive field that silence is held to be an indication that the particular subject shall be left free from regulation.

Robbins v. *Taxing District of Shelby County*, 120 U. S. 489, 30 L. Ed. 694, 696.

At p. 736, the Court continues:

> "*The greatest difficulty* does not arise in these two classes of cases where it appears reasonably clear that the business is either strictly local and has no connection whatever with (Fol. 739) interstate commerce or where the business is of an interstate character and a matter of national concern. *The real problem* is presented in those situations where the business may to some extent affect interstate commerce, where congress has not seen fit to regulate, and where no question of national public policy is involved. In that group of cases the line of demarcation cannot always be clearly drawn." (Italics supplied).

At p. 737, R., the Minnesota Court speaks of "this vexatious and difficult problem."

At p. 740, R., the Minnesota Court states that "*the United States Supreme Court has not passed directly on the precise question here presented* * * *" (Italics supplied).

This, we submit, fully justifies our original statement that the "Supreme Court of Minnesota recognizes that there is involved in this case an important question of Federal law not heretofore ruled on by this Court * * *" Reason 8, p. 32, Petition.

(f) We have covered Respondent's criticism of reason 9.

(g) Respondent's criticism of reason 10 has no merit. The claim that the Minnesota Foreign Corporation Act imposes "the same *franchise tax* (Italics supplied) as it imposes upon its own domestic corporations," is an incorrect statement unless the words "franchise tax" implies some hidden and unappreciated meaning. Minnesota does not, and other states do not, conceal the fact that discriminations are practiced against foreign corporations seeking admission to the State. If it were not so, the Supreme Court of Minnesota would have no justification for saying:

> "It is well settled that a state may impose such restrictions as it sees fit as a prerequisite to a foreign corporation coming into the state to do business." P. 733, R. * * * "Statutes similar to the one here invoked by defendants have usually been held to place an undue burden on interstate commerce and hence to be unconstitutional as to foreign corporations engaged in interstate business." P. 734, R.

The effect of the Minnesota decision, if it becomes a precedent, is undeniably that corporations licensed as customhouse brokers, must qualify, and keep qualified, in every state of the Union where similar Foreign Corporation acts exist.

(h) Petitioner respectfully adheres to reason 11.

The question before the District Court and the Supreme Court of Minnesota was not whether Petitioner's Customhouse brokerage business obstructed or interfered with the power of Congress to regulate interstate commerce. The Respondent contended in the District and Supreme Courts that petitioner's customhouse brokerage business was not interstate commerce, and that therefore petitioner was subject to the Minnesota Foreign Corporation Act.

The Petitioner on the other hand contended in the same Courts that its business has such "a substantial relation to interstate (or foreign) commerce" that it was protected by the constitutional commerce clause and that to require it to comply with the Minnesota Foreign Corporation Act was to place an undue burden on interstate commerce, because the Minnesota Foreign Corporation Act, if enforced against, it, interfered with or obstructed "the exercise of the granted power of Congress to regulate interstate commerce." P. 737 R.

Beginning with the new sentence of the 5th line from the end of p. 742, continuing on p. 743, R. — the Court explains that the requirements of the Minnesota Foreign Corporation Act are "reasonable", "and not a hardship upon the business. Nor do we think", the Court continues, "that it is an obstruction upon the commerce itself nor an interference therewith under the facts in the instant case".

These two lines of thought of the Supreme Court of Minnesota appear inconsistent because it was never claimed by either party to this case that the business of Petitioner as a customhouse broker interfered with or obstructed interstate commerce.

Respondent's "Further Arguments" and Cases Studied.

"The judicial task" in this case is not to mark "out the extent to which Congress has exercised (or may exercise) its constitutional power over commerce." As we view the problem, it is only necessary to recognize and apply to this case ancient principles of interstate "commerce".

Wickard v. *Filburn*, 87 L. Ed. 57; *United States* v. *Darby*, 312, U. S. 100, 85 L. Ed. 609; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 86 L. Ed. 1638, 1644 to 1649,—and *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572, are cases which

construe congressional extensions of its exclusive authority in the field of "commerce", granted to Congress by the Constitution. But that is not true in the instant case. On the contrary, it seems to us that the relationship between the functions of a customhouse broker and the functions of the agency to which is assigned the task of safeguarding the revenues of the United States is so intimate that never before has the claim been made that the broker's services have no connection with interstate or foreign commerce.

Is it not clear that the customhouse broker is an implement used by the Government for regulating commerce and for safeguarding the revenues of the United States which accrue to the United States under the Tariff Act? The effects of the activities of the customhouse broker are clearly beneficial to the Government and to Foreign commerce. His services are inseparable from the foreign commerce out of which he receives his compensation and the Government its revenue. If these his activities are hindered, obstructed, or burdened, definite and self-evident repercussions will be felt to exert a positive influence on the nation's business, and the Treasury of the United States because his services are attached to, and exert a substantial economic effect on, "foreign commerce." Without his services, the entire Tariff revenue system would deteriorate into disorder and the machinery used for the collection of the public revenue would have to be revamped or enlarged beyond present-day conceptions.

> "'Commerce' in its broadest acceptation embraces not merely traffic, but the *means* and vehicles by which it is prosecuted."
>
> *Chicago, N. W. Ry. Co.* v. *Fuller*, 84 U. S. 560, 21 L. Ed. 710.

Since the Constitution is the supreme law of the land a State is without power to determine whether action of the

state will obstruct or interfere with or burden commerce. This power inheres exclusively in the United States.

Alabama & V. Ry. Co. v. *Jackson*, 271 U. S. 244, 70 L. Ed. 928, 931;

Louisiana, etc. v. *Texas, etc.*, 284 U. S. 125, 76 L. Ed. 201.

A state may possibly impose regulations under its police power, although such regulations may affect interstate commerce, until such time as Congress takes possession of the field under its superior authority; but that power "does not apply where the state undertakes to regulate interstate commerce by imposing burdens upon it."

Lemke v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458.

"* * * It is too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it * * *."

Baltimore & Ohio Southwestern Railroad Co. v. *Lula Burtch*, 68 L. Ed. 433, 436.

On these principles, and on the fact that a customhouse broker is not the ultimate consignee, but a sort of station or agent used in the flow of foreign commerce by the originating shipper in Canada, by the ultimate consignee in the United States, and by the Government to facilitate the free flow of commerce and to collect the duty assessed under the Tariff Act before the goods reach the ultimate consumer, there to become commingled with the property of the state, the Petitioner claims its business is interstate or foreign commerce, and that it is relieved of the onerous burdens imposed by the Minnesota Foreign Corporation Act.

McNeill v. *Southern*, 202 U. S. 543, 561, 562, 50 L. Ed. 1142, 1148.

Even if petitioner's business and activities are "local and though it may not be regarded as commerce", it is still protected by the Commerce Clause because its business "exerts a substantial economic effect on (foreign) commerce."

Words in quotation from *Wickard* v. *Filburn, supra.*

Summary.

In the enactment of our Tariff system, Congress has authorized the Secretary of the Treasury to license persons, corporations and partnerships to engage in the business of customhouse brokers within geographically defined areas, called U. S. customs collection districts. The duties prescribed by Congress and the Treasury for, and the business done by, these customhouse brokers are identical in each district. They and their business are means or implements employed by the Government in the regulation of the nation's foreign commerce and for the protection and collection of the public revenue derived from duties imposed on importations into the United States from a foreign country under the Tariff Act.

So, reducing the case to its narrowest compass the problem may be stated thus:

The petitioner, who is a North Dakota corporation and a licensed customhouse broker, brought suit in the proper district court of Minnesota, namely, in the county included in the district for which it was licensed to transact its customhouse brokerage business, to secure a judgment that Respondent be ordered to account to it as a constructive trustee for a large sum of money for which he had wrongfully refused to account, derived from customhouse brokerage business conducted at Noyes, within the district.

Among other defenses the Respondent pleaded that since the Petitioner is a North Dakota corporation, and had not qualified under the Minnesota Foreign Corporation Act,

the District Court was without jurisdiction to hear and determine the cause.

The Petitioner answered this defense by saying that it had not obtained a certificate of authority to do business in Minnesota pursuant to the Minnesota Foreign Corporation Act, but that nevertheless the Court had jurisdiction because Petitioner was engaged in foreign and interstate commerce, and that therefore the Minnesota Foreign Corporation Act, imposing burdens and restrictions on foreign and interstate commerce, did not apply and could not be used to prevent it from the use of the Minnesota courts without violating its constitutional rights.

The District Court of Minnesota overruled the objections of the Respondent, assumed jurisdiction of the cause and held "that the customhouse brokers, involved herein, are established as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the United States and the Dominion of Canada" (P. 699, R.).

Thereupon the Respondent appealed to the Supreme Court of Minnesota. There again the Respondent contended that the District Court of Minnesota had rendered a void judgment because it had no jurisdiction for the reasons assigned in the lower court.

The Petitioner replied in the Supreme Court, as it had done in the district court, that its business was so closely related to foreign commerce that to enforce the provisions of the Minnesota Foreign Corporation Act against it was to burden and obstruct "commerce" within the purview of Art. I, Sec. 8, cl. 3 of the Constitution of the United States.

The Supreme Court of Minnesota reversed the District Court and held:

> "The broker acts as an independent contractor to perform this personal service for the shipper. He does not come into contact with the commerce itself in any

way insofar as its actual movement is concerned. He is at the most an aid or facility to the commerce and but remotely, if at all, affects it. We fail to see how such a broker is an instrumentality of the commerce. Therefore, it seems to us that the statutory requirement is not an obstruction or interference with interstate commerce." (The last par., on p. 738, ending on p. 739, R.)

Thereupon the Petitioner brought this petition for a Writ of Certiorari to obtain a review of the decision rendered by the highest court of the State of Minnesota.

Thus, in the final analysis, the issue is:

Did the Supreme Court of Minnesota err in reversing the holding of the District Court, and in holding that the customhouse broker "remotely, if at all, affects" foreign and interstate commerce, and that the provisions of the Minnesota Foreign Corporation Act are "not an obstruction or interference with interstate commerce."

On the facts herein, and for reasons set forth in the petition, in our original supporting brief and in this reply brief, and on the authorities cited, Petitioner respectfully prays this Honorable Court that its petition for this Writ be granted.

Respectfully submitted,

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